

1987

Alfred Neilson v. Carleen Neilson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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| ALFRED NEILSON, |) | |
| |) | |
| Plaintiff and |) | |
| Respondent, |) | |
| |) | |
| v. |) | Case No. 870591-CA |
| |) | |
| CARLEEN NEILSON, |) | Argument Priority |
| |) | Classification 14b |
| Defendant and |) | |
| Appellant. |) | |

REPLY BRIEF OF APPELLANT
CARLEEN NEILSON

Appeal from Judgment from Third Judicial District Court
for Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, District Judge

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Defendant, Carleen Neilson, files a reply brief to brief of respondent as follows:

I. THE PRENUPTIAL AGREEMENT DOES NOT VIOLATE PUBLIC POLICY

In plaintiff's statement of facts, he asserts his own testimony as a basis for his factual conclusions without any reference to the court's Findings of Fact. For example, plaintiff makes allegations about how the parties came to live together prior to marriage; defendant's demeanor prior to and during the marriage; defendant's religious beliefs and intentions; the pre-marital and marital finances; and, plaintiff's sexual expectations; and defendant's sexual performance, defendant's behavior; and, conclusions about her motives. See Brief of Respondent, pp. 3-10. For each conclusion plaintiff relies upon his own testimony, not the trial court's factual findings to support his assertions. Plaintiff ignores defendant's testimony to the contrary concerning the above allegations. Since, the plaintiff's allegations are mere assertions, not part of the trial court's factual findings, and specifically contradicted by defendant, such assertions are not properly fact to be relied upon by this Court. See Sharf v. BMG Construction, 700 P.2d 1068 (Utah 1985).

Plaintiff makes these allegations for one reason: to establish that he had a bad marriage. This supports his argument that because he had a bad marriage he should not be held responsible for his obligations under the Prenuptial Agreement. Whether defendant was a bad marriage is not the issue. The issue

is whether the trial court correctly interpreted the Agreement and correctly applied the law.

A. The Prenuptial Agreement Did Not "Promote" or "Encourage" Divorce.

Defendant argues that the public policy of Utah promotes marriage; and, that the Agreement violates public policy. Plaintiff refers to paragraph 9 of the Agreement as a "profiteering" provision. See Brief of Respondent, pp. 16-20. In effect, plaintiff argues that paragraph 9 acted as a financial incentive for defendant to try to induce plaintiff into filing an action for divorce by "abandoning the marriage and disregarding the marriage vows," within "an undue short period of time" after the marriage. Id. at 18. Plaintiff's cites the following cases to support his argument: In re the Marriage of Nogherly, 215 Cal. Rptr. 76 (Cal. Ct. of App. 1985); and Gross v. Gross, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984).

The trial court did not find that defendant totally disregarded her vows shortly after the marriage. The trial court found both parties were "totally noncommunicative," "hostile," and "did not discuss any marital concerns or problems" with each other. (R. 390-91) Importantly, the trial court found the defendant did not defraud plaintiff in entering into marriage. (R. 394, 396). No findings of the court suggest anything malicious, defrauding or calculating on defendant's part. No findings of the court indicate defendant disregarded her marital vows shortly into the marriage, any more than that plaintiff

disregarded his vows to work at making the marriage successful. Instead, the trial court's factual findings supports the argument that the marriage was in trouble from the start; and, that both parties contributed to its failure. Simply put, there is a world of difference between what plaintiff claims as justification for voiding the Agreement (disregarding the marital vows) and irreconcilable differences. In this case, plaintiff proved irreconcilable differences as grounds for a divorce and nothing more.

The case of In re the Marriage of Nogherly *id.*, support defendant's argument. Nogherly's holding was based on the following factors: the prenuptial agreement did not define the separate character of property acquired prior to marriage; the prenuptial agreement did not deal with property upon death; under the prenuptial agreement, the wife still got \$500,000 or half regardless of who initiated the divorce; the parties did not seek legal counsel prior to executing the prenuptial agreement; the husband testified he did not want to sign the prenuptial agreement; the husband was not a lawyer; and, the parties signed the prenuptial agreement on the wedding day. (See In re Marriage of Nogherly, 215 Cal. Rept. at 153-6.)

In this case the facts and the Agreement are fundamentally different from Nogherly. The Agreement consists of a six page document. The document carefully articulated the community or separate nature of the parties' property acquired prior to marriage, acquired during the marriage, and distributed upon its dissolution. See Prenuptial Agreement ¶1, defining the separate

nature of the property acquired prior to marriage; Prenuptial Agreement ¶6, the Prenuptial Agreement intentionally limits the rights of both parties to make a claim as to the other's estate; Prenuptial Agreement ¶9, defining the community nature of the stock during the marriage; Prenuptial Agreement ¶8, defining the division of property upon death. Unlike Noqherty, defendant did not get half of everything if she filed for divorce. It was only plaintiff who lost one-half of his stock upon his filing for divorce. Furthermore, plaintiff and defendant consulted attorneys; and, both agreed to sign the Agreement well before the wedding date. Lastly, plaintiff was educated in law, a businessman all his life, and who understood the nature of contracts and the purpose of the Prenuptial Agreement. Plaintiff also cites the case of Gross v. Gross, 464 N.E.2d 500 (Ohio 1984). This case fortifies defendant's position that the Prenuptial Agreement was upheld even though the party seeking the divorce was provided a substantial sum in the Agreement if a divorce occurred. The dicta of the court cited by defendant refers to plaintiff in this action. It is plaintiff who abandoned the marriage and disregarded the marriage vow. He refused to work out problems and filed for annulment.

Plaintiff ignores defendant's arguments that the Prenuptial Agreement's language promote a marriage and encourages the parties to work at resolving any difficulties. It was in error for the trial court to make a legal conclusion that the Prenuptial Agreement encouraged divorce. Plaintiff also ignores

the proposition that the trial court must independently construe the Agreement's language to determine whether it promotes divorce. Plaintiff ignores the proposition that the Agreement did not violate public policy simply because it disproportionately disposes of property upon divorce. Plaintiff also argues the fact that the trial court specifically rejected a proposed finding of fact that stated the Prenuptial Agreement "encouraged divorce." The trial court's factual findings and legal conclusions are erroneous because a prenuptial agreement that facilitates divorce (i.e. provides a mechanism for an easier separation and a definitive division of property) does not violate public policy. It is very different than a finding that the Agreement promoted divorce. The court refused to make a finding that the Agreement "encouraged" or promoted divorce.

B. "Initiate" Means File for Divorce.

1. Definition of Word.

Plaintiff argues that the word "initiated" in paragraph 9 of the Prenuptial Agreement means "due to the fault of one party . . . the other party was forced to file a complaint for divorce." See Brief of Respondent, pp. 20-21. Plaintiff's argument robs the word "initiated" of its common and usual meaning. The word "initiated" means to "begin or set going." See Websters Third New International Dictionary, p. 1164 (1971). Initiated when applied in the context of the Agreement, and when given its correct meaning, means that plaintiff initiated divorce action when he filed for annulment; and, was therefore obligated by

paragraphs 9 and 10. (See also Rule 3 URCP, a civil action is commenced by the filing of a complaint.) Plaintiff filed his Petition, he commenced the action, he "initiated" the procedure on petition for dissolution of the marriage.

2. The Parties' Intent

Plaintiff also argues that the trial court found the Agreement ambiguous; and, did not reflect the parties' intent. For that proposition, plaintiff cites his own testimony at trial.

The trial court did not find the Agreement ambiguous. The court found that the Agreement did not accurately reflect the parties' intentions. (R. 394). Assuming the Agreement was ambiguous, it was then the trial court's duty to determine the parties' intent. However, as noted above, the Agreement clearly stated the parties' intent; and consequently, that language was not ambiguous and the language of the Agreement should govern.

Plaintiff argues he did not initiate an action for divorce, he initiated an action for annulment which he claims is conceptionally different. Plaintiff then argues that because the trial court, upon its own motion, gave the plaintiff a divorce he is not obligated under paragraphs 8 and 9 of the Agreement. Plaintiff's argument taken to its logical end means that even though plaintiff did not object to a divorce, the trial court abused its equitable discretion; or, that the parties are still married.

When the court modified the complaint to assert at equity the remedy of divorce, plaintiff informed the court he

wanted to end the marriage. Previously, and at that time, defendant indicated she did not want to end the marriage; and, under no circumstances would she counterclaim for divorce. If plaintiff and defendant would have both objected to the trial court's motion, it would have been an abuse of the court's equitable discretion to dissolve their marriage without finding grounds for annulment. Since plaintiff's claim for annulment was denied and defendant had not counterclaimed for divorce, then the plaintiff tacitly initiated a divorce (by agreeing with the trial court's equitable remedy) or there was no dissolution of their marriage. A court cannot dissolve a marriage unless one party requests a divorce or an annulment and initiates an action to obtain that relief.

3. The Marriage Itself and Waiver of Mutual Rights was Sufficient Consideration for the Marriage.

Plaintiff argues that consideration for the Prenuptial Agreement and the marriage contract failed because the defendant failed to change her lifestyle after marriage; and that she did not give plaintiff a "traditional" or "normal marital relationship". Plaintiff's argument ignores the law, a judge's proper role in making factual and legal decisions, and the realities of life.

A prenuptial agreement has valid consideration with a simple promise to marry. See Appellate Brief, pp. 18-20. The Agreement did not call for a "traditional" or "normal marital relationship". Id. The Agreement only called for the parties to

marry, which occurred. For the trial court to void the Prenuptial Agreement on any other basis or any other claim of failed consideration, was an abuse of discretion. Furthermore, the Agreement called for a mutual waiver of rights, which also constitutes valid consideration.

As argued previously, it is not the proper role of the trial court to define what is a "normal marital relationship". See Appellate Brief of Appellate, pp. 17-20. For the court to use its own standards or judgment is simply too subjective. One person's definition of a "normal marriage" differs from another's view. Indeed, within marriage, partners have differing views as to what is a "normal marital relationship."

In the 1980s there is no such thing as a "traditional" marriage because of the changes in social norms. These changing social norms truly prohibit any court or individual from coming up with a definition or absolute standard for a normal marriage.

The trial court abused its discretion when it sought to define a "normal marital relationship" as the Prenuptial Agreement's consideration. The Prenuptial Agreement did not call for such consideration; and, therefore, the trial court erred as a matter of law.

4. The Court Established the Parameters of the Trial Court's Equitable Power.

Plaintiff argues that the trial court should have equitable power to disrupt the Prenuptial Agreement. See Brief of Respondent, pp. 26-28. For this proposition, plaintiff cites

Mathie v. Mathie, 12 Utah 2d 116, 363 P.2d 779 (1961), and Penrose v. Penrose, 656 P.2d 1017 (Utah 1982); and numerous other cases dealing with an unconscionability standard for normal contracts. Id. Plaintiff does not argue that the Prenuptial Agreement was unconscionable, plaintiff does argue that the trial court may set aside the Agreement at its own whim based upon some standard of fairness. Plaintiff's argument does not address the proposition that the court should adopt a particular standard for review of prenuptial agreements. The current standard for reviewing contracts is set forth in the Brief of Appellant, pp. 22-24. Plaintiff fails to address this argument; and fails to attack the validity of the leading case in this area. Gant v. Gant, 328 S.E.2d 106 (W.Va. 1985). A fairness standard does not exist anywhere else in contract law; and, it should not exist with prenuptial agreements. Contracts are sacred to the extent that two parties should be free to enter an agreement and the court will enforce its terms. To adopt a fairness standard for prenuptial agreements would destroy the parties' ability to contract and virtually guarantee the inconsistent and differing results (on a case by case basis) when a trial court reviews prenuptial agreements.

5. Defendant's Conduct was not Contemptual

Plaintiff agrees that the trial court erred in holding the domestic relations commissioner's recommendation was a binding order. See Brief of Respondent, pp. 29-30. However,

plaintiff argues defendant was in contempt because she violated a stipulation. Id.

Defendant was not in contempt because neither the stipulation nor the commissioner's recommendation were binding orders. Plaintiff does not deny that defendant objected to the commissioner's recommendations; including, the proposed stipulation which was included in the recommendations to restrain the parties from disposing of marital assets. The commissioner recommended a mutual restraining order preventing both parties from disposing of assets. Defendant properly filed objection and acted accordingly. Prior to the trial court's final determination, plaintiff like defendant disposed of stock. The trial court ruled that defendant had violated a commissioner's order (the commissioner's recommendation); and consequently was in contempt. (R. 217) The trial court erred in its ruling.

6. The Trial Court's Award of Attorneys' Fees was in Error.

Plaintiff argues that the trial court has great discretion in fixing attorneys' fees in a divorce action. According to plaintiff, this discretion includes ordering one party to pay his or her attorney costs. For that proposition, plaintiff cites Morrison v. Peck, 376 P.2d 58 (Colo. 1962). As plaintiff will demonstrate the trial court erred in: (1) ordering her to pay her own attorney; and, (2) fixing the specific amount she was to pay. In Morrison, the Colorado Supreme Court did not address the

issue of whether it was proper to order one party to pay his or her own attorneys' fees. Rather it defined the issue as follows:

Apparently the trial court was laboring under the impression that application for attorneys' fees was an order in behalf of Morrison [the parties' attorney] as against his own client. We do not so construe Morrison's motion. It sought the entry of "an order" determining the fee to which he is entitled for representing plaintiff in the within action,

In that case, the parties settled; and, the husband agreed to indemnify the wife from liability on a claim filed by attorney. Therefore, the attorney brought an action to determine the fee the husband owed for his wife's attorney. Consequently, the Colorado Supreme Court ruled it was appropriate for the trial court to set the amount of Morrison's fee. See Morrison v. Peck, 376 P.2d at 60.

That court did not specifically reach the issue of whether it was proper for a court to order one party to pay his or her own attorneys' fees. Furthermore, plaintiff ignores defendant's argument, and decided authority, that it was also an abused discretion to set the specific amount plaintiff was supposed to pay her attorney. See Brief of Appellant Carleen Neilson, pp.29-30.

The court abuses its discretion by ordering a party to pay his or her attorneys' fees; and, fixing the specific amount she or he is to pay. Such a determination interferes with the private contract between the party and his or her attorney.

CONCLUSION

The trial court found the defendant did not defraud plaintiff in entering the marriage contract. No finding suggests anything malicious or calculating on defendant's part. No finding indicates that defendant consciously disregarded her marital vows. Instead, the trial court's factual findings only support the argument that the marriage was troubled from the start; and, that both parties contributed to its failure. Simply put, there is a real difference between what plaintiff claims as justification for voiding the Agreement (disregarding the marital vows) and irreconcilable differences as grounds for divorce. The case should be remanded for enforcement of the terms of the Prenuptial Agreement and for a proper entry of judgment for attorneys' fees and costs.

DATED this 22nd day of August, 1988.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT CARLEEN NEILSON to be mailed, postage prepaid, this 23rd day of August 1988 to:

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